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No. 838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

DIVISION NO. 14, THE ORDER OF RAILROAD TELEGRAPHERS, by R. D. WILSON, ET AL., *Petitioners*,

v.

G. E. LEIGHTY, PRESIDENT, THE ORDER OF RAILROAD TELEGRAPHERS, H. C. WYATT, VICE PRESIDENT AND GENERAL MANAGER OF NORFOLK AND WESTERN RAILWAY COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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BRIEF IN OPPOSITION FOR RESPONDENTS

OPINIONS BELOW

The District Court's decision in the case, in the form of written Findings of Fact and Conclusions of Law, is not reported. Since these Findings and Conclusions are not appended to the petition, we have appended

them to this brief as Appendix A. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (App. A of Petition)[1] is reported in 298 F. 2d 17.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 3, 1962. Since a copy of such judgment was not appended to the petition as required by the Rules of this Court (Rule 23, par. 1 (j)), we have added it as Appendix B to this brief.

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[1] Following the Index, the petition includes reference to Appendices A through Q (Pet. pp. i-iii). An explanatory Note (Pet. p. i) read as follows: "All page references to appendices are to pages in the certified appendix of the Clerk of the United States Court of Appeals, except appendix A & Q which are attached to this petition. References are made to the appendix by designating the appendix of the appellant and appellee followed by a page number."

Throughout the petition, particularly in the Statement (pp. 6-10), reference is made to the various agreements and other documents of record as "Appendix H", "Appendix F", etc. The Court may find this index and references to the Appendices confusing since none of documentary material included in the transcript of record certified by the Clerk of the court below bears the letter designations listed by petitioners. What has been transmitted to this Court as Volume I of the record is a copy of the printed appendices filed by the parties in the court below (as permitted by par. 3 of Rule 21 of this Court). Volume II consists of the decision and judgment of the court below. To avoid confusion in referring to documentary material contained in Volume I, and to permit the Court to locate the material to which reference is made, we shall refer to it by page number in the particular printed appendix in which it appeared below; i.e., that of defendants-appellees as (Dfts. App. p.) or that of plaintiffs-appellants as (Pltfs. App. p.). In the interest of further clarification, the Court's attention is invited to the fact that each of such printed appendices contains an index of the material included therein.

The jurisdiction of this Court is invoked by petitioners (Pet. p. 2) "under 28 U.S.C.A. § 1254(1), 28 U.S.C. § 1337, and U. S. Supreme Court Rule 23, Federal Rules 12 and 56, and under the provisions of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 411 and 412. Railway Labor Act 45 U.S.C. § 151, et seq."

We agree that jurisdiction to review the judgment of the Court of Appeals exists under 28 U.S.C. § 1254 (1) and Rule 19 of this Court. We do not agree, however, that the statutes relied upon by petitioners in their jurisdictional statement either establish federal jurisdiction or show the basis for federal jurisdiction in the court of first instance as required by this Court in paragraph 1 g) of Rule 23. Our reasons will be discussed, *infra*, under our statement of statutes involved and in the course of argument.

QUESTIONS PRESENTED

1. Whether the validity of an agreement between respondent railroad and The Order of Railroad Telegraphers, negotiated on the latter's behalf at the direction of its international president (respondent Leighty), providing for a modified merger (or "dovetailing") of seniority of telegrapher employees of the former Virginia Railway with those of the Norfolk and Western Railway as a result of a merger of these two carriers approved by the Interstate Commerce Commission—which is challenged on the sole ground that one of the subordinate divisions (petitioner Division No. 14) rather than the parent union is the lawful representative of the telegraphers employed by respondent railroad—presents a federal question under the Railway Labor Act or Labor-Management Report-

ing and Disclosure Act of 1959 as asserted by petitioners, or is not a question within the jurisdiction of the District Court because the claim is, in substance, an intra-union representation dispute subject to the exclusive jurisdiction of the National Mediation Board (as held by the Court of Appeals) or because it involves only the internal laws of the parent union (as held by the District Court) or because the alleged injury (infringement of seniority rights) presents subject-matter within the exclusive jurisdiction of the National Railroad Adjustment Board (an alternative jurisdictional holding of the District Court),

2. Assuming jurisdiction, whether there is any error in the District Court's decision on the merits of such substance and importance under Rule 19 of this Court as to justify a grant of certiorari.

STATUTES INVOLVED

The provision of the Railway Labor Act (45 U.S.C. § 151, et seq.) which is involved in the holding of the Court of Appeals, that the basic issue raised by the complaint is nonjusticiable in the federal courts because subject to the exclusive jurisdiction of the National Mediation Board, is Section 2, Ninth, which in pertinent part states as follows (45 U.S.C. § 152, Ninth):

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, wherein thirty days after the receipt of the invocation of its services, the name or names of the

> individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier . . ."

Section 3, First (i) of the Railway Labor Act is also involved to the extent that one of the grounds for the District Court's holding that it lacked jurisdiction was that the alleged injury—infringement of petitioners' seniority rights contrary to an agreement with respondent railroad—is subject-matter within the exclusive jurisdiction of the National Railroad Adjustment Board by virtue of Section 3, First (i) of the Railway Labor Act which provides (45 U.S.C. § 153, First (i)):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The District Court rejected petitioners' contention that the agreement entered into by respondents violated their rights under the Railway Labor Act and held that no right, privilege or obligation arising under that Act was actually in issue. On the contrary, it held that the controversy concerned solely the question of

whether the said agreement was a valid exercise of authority by the international president under the internal laws of the international union. (Appendix A, p. 3a). The Court of Appeals agreed that no issue of invalidity of the agreement was presented in terms of alleged violation of the Railway Labor Act and that the validity of the agreement turned solely on the question of whether the parent union or its subordinate Division 14 had the representative authority to make the agreement. Consequently, no claim under 28 U.S.C. § 1337 is presented because of the Railway Labor Act.

In their statement of jurisdiction and of statutes involved and again in their argument of reasons for granting the writ petitioners also rely upon Sections 411 and 412 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411, 412, which they contend establish jurisdiction in the federal courts to adjudicate the issue presented by this case. It is respondents' position that these provisions of statutory law are not, and never have been, at issue between petitioners and respondents or involved in this case, as we shall show in Argument; *infra*.

STATEMENT

Petitioners' statement of the case and the facts material to consideration of the questions presented is argumentative and is further complicated by the fact that references are made throughout to certain lettered appendices which cannot be located by respondents or this Court in the record certified by the court below under the designated letters. We have attempted to remedy this confusion as already pointed out in footnote (1) of this brief.

We do not believe that extensive discussion of the facts by respondents is necessary or desirable at this point for the following reasons. First, this is not a brief on the merits. Second, the District Court entered detailed written Findings of Fact (as well as Conclusions of Law) which we have reproduced as Appendix A to this brief and to which we invite the Court's attention. Third, the Court of Appeals agreed with the District Court that the only question of substance involved is the very narrow one of whether the railroad should have bargained with Division 14 rather than with the parent union, thereby limiting the factual problem. Fourth, petitioners conceded in their brief to the Court of Appeals that there is no dispute with respect to the facts as stated by the District Court but only "conflict in the interpretation of these facts by the various parties."

Accordingly, we shall confine our discussion of the facts to Argument, *infra*, to the extent they become pertinent in reply to argument in the petition.

However, we do believe that a more careful statement at this point of the several grounds of the decisions below will prove helpful to the Court, particularly since each of these grounds, or holdings, are directly relevant, as we see it, to the question of whether certiorari should be granted or denied.

The District Court held that it lacked jurisdiction on several grounds: (1) for want of a Federal question (the only ground relied upon in the complaint) because the real issue presented involves no provision of the Railway Labor Act or Reporting and Disclosure Act but only whether respondent Leighty's action in authorizing the agreement with respondent railroad

violated the internal laws of the union; (2) because the alleged injury (infringement of petitioners' seniority rights contrary to an agreement with respondent railroad) is subject-matter within the exclusive jurisdiction of the National Railroad Adjustment Board; and (3) because no showing of irreparable injury warranting the issuance of an injunction had been made by petitioners. (Appendix A, pp. 2a-4a).

In addition to its jurisdictional holdings, however, the District Court held a hearing, took testimony and received exhibits, and decided the case on the merits, as a result of which it denied petitioners' motion for an injunction, granted respondents' motion for summary judgment, and dismissed the complaint. (Dfts. App. p. 2)[2] The decision on the merits upheld as valid, under the union's internal governing laws and as not contrary to the Railway Labor Act or any applicable statute, an agreement between respondent railroad and the established statutory representative of its telegrapher employees merging seniority of those employees on the former Virginian Railway with those of the Norfolk and Western Railway as a result of a merger of these two carriers approved by the Interstate Commerce Commission.

In affirming the order of the District Court (Appendix B), the Court of Appeals agreed that the only issue of substance presented was whether "the railroad should have bargained with Division 14 rather than with the parent body", and it further agreed that such an issue was not within the jurisdiction of the

[2] As explained above in footnote (1), reference is to the printed appendix filed jointly by defendants-appellees in the Court of Appeals, a copy of which was transmitted by the Clerk of that court to this Court as a part of the certified record.

District Court. But the specific ground of its decision was different in that it conceived the issue essentially to be an intra-union dispute over representation rights which, under settled decisional law of this Court, is subject to the exclusive jurisdiction of the National Mediation Board.

The Court of Appeals did not reach or discuss either of the two additional jurisdictional holdings of the District Court or the merits of the case.[3]

ARGUMENT

The issue in the present case is uniquely narrow, and no amount of strained interpretation of the facts or reliance upon inapplicable statutory provisions and decisions can convert it into one justifying review by this Court on certiorari. As viewed by both the District Court and Court of Appeals, the real nub of the controversy was whether an agreement between respondent railroad and The Order of Railroad Telegraphers,[4] executed on the latter's behalf by its international President and three Vice Presidents (Dfts. App. pp. 35-39), providing for a modified merger (or "dovetailing") of seniority of telegrapher employees of the

[3] The opinion of the Court of Appeals (Appendix A of Petition) does, however, conclude with this observation with respect to the merits:

> "On the face of things, it would seem appropriate and consistent with national labor policy for a parent labor organization to undertake through its own organizational machinery to remove internal tensions by resolving disputes between two of its subordinate bodies pressing competing claims to work opportunities for their respective members. However, if these intra-organizational efforts are challenged, Board action, not judicial intervention, is indicated."

[4] Herein, referred to as ORT or the parent union.

former Virginian Railway with those of the Norfolk and Western Railway[5] as a result of a merger of these two carriers approved by the Interstate Commerce Commission, was invalid on the alleged ground that Division 14 of ORT rather than the parent union is the true collective bargaining representative of the telegraphers employed by the N&W Railroad.

Respondents submit that whether this issue be viewed as one not cognizable by the federal courts because solely within the jurisdiction of the National Mediation Board, as held by the Court of Appeals—or because such a question actually involves only the internal laws of the union, as held by the District Court (Appendix A, p. 3a) the result is the same, a lack of federal jurisdiction justifying dismissal of the complaint.

But even if the issue be viewed in the light most favorable to petitioners as one within the jurisdiction of the District Court because it involves the "validity" of an agreement under the Railway Labor Act rather than its interpretation or application (nothwithstanding the fact that the asserted invalidity depends solely upon the merits of petitioners' claim of representative authority), the District Court has already entertained and resolved all issues presented by petitioners on the merits after hearing and receipt of testimony of witnesses and exhibits and consideration of affidavits filed in support of the pleadings (Dfts. App. p. 2). In support of the judgment below, we submit all of the holdings in the decision of the District Court as well as that of the Court of Appeals under the established rule of Federal appellate court procedure that this Court will consider grounds urged by a respondent

[5] Herein referred to as N&W Railroad.

to support a judgment in his favor different or additional to those upon which the court immediately below rested its decision, *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435-436; *Langnes* v. *Green*, 282 U.S. 531, 538-539; *United States* v. *Ballard*, 322 U.S. 78, 88; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547. We believe it particularly appropriate to urge full consideration of all such grounds at this time because when the controversy is viewed in the light of this plenary disposition by the District Court, it becomes apparent that the issue turns upon its own particular facts and will affect few, if any, other litigants. Consequently, as we shall show in reply to petitioners' argument, the judgment below (Appendix B) which affirms the order of the District Court presents no important question of federal law which should be settled by this Court nor any decision which is in conflict with applicable decisions of this Court or decisions of other federal courts on the same issue.

Petitioners assign as reasons for granting the writ (Pet. pp. 10-17) the four following contentions:

First, they maintain that the decision below should be reviewed because it refused to recognize the applicability of the Labor-Management Reporting and Disclosure Act of 1959 to the facts of the case.

Second, they contend that the courts below failed to recognize that provisions of the Railway Labor Act were violated when the N&W Railroad made the challenged agreement with the parent union rather than with its subordinate Division 14.

Third, they assert that there is a conflict between the decision of the two courts below over whether petitioners should proceed before the National Railroad

Adjustment Board or before the National Mediation Board.

Fourth, they contend that the jurisdictional holding of the Court of Appeals is in conflict with this Court's decision in *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, and with decisions of the Third, Fifth and Sixth Circuit Courts of Appeals on the same issue here involved.

We shall deal with each of these contentions in the order above indicated. Finally, we contend that the judgment below is manifestly correct and that the petition for certiorari should be denied.

1. No Issue Under the Labor-Management Reporting and Disclosure Act of 1959 Is Involved in This Case

In support of its argument that the decision below refused to recognize the applicability of the Labor-Management Reporting and Disclosure Act of 1959 to the facts in this case, petitioners specifically rely on paragraph (4) of Section 101(a) of that Act (29 U.S.C. § 411(a)(4)) which in substance provides that no labor organization shall limit the right of any of its members to institute an action in any court beyond a four-month lapse of time which may be required to exhaust reasonable hearing procedures within the union. Petitioners contend that by such provision it "was certainly the intention of Congress to prevent just exactly what has happened here—a 4-year delay before the union members can complete the appeal procedures within the union" (Pet. p. 11) before going to the courts for solution of their problem. They next point out that Section 102 (29 U.S.C. § 412) establishes jurisdiction in the federal courts to remedy a violation of Section 101, and they argue that consequently their case was properly before the District Court since any further

appeal by them within the union could not be taken until the 1964 Convention of the parent union.

Such an argument obviously presupposes that the parent union has attempted to prevent petitioners from instituting the present litigation on the ground they have not exhausted their internal remedies within the organization since that is the express prohibition of the statutory provision relied upon by petitioners. On the contrary, the pleadings of record show that respondents have asserted no such defense to this action (Dfts. App. pp. 44, 50-58). In fact, the Convention Resolution under which respondent Leighty acted in authorizing the agreement with the N&W Railroad alleged to be invalid by petitioners provides for an appeal from his decision to the Board of Directors and it further provides that such decision "shall be final" (Dfts. App. p. 40). Since petitioners took their appeal to the Board of Directors and that Board affirmed the action of respondent Leighty (Dfts. App. pp. 59-61), there is no further appeal available to petitioners within the union. Therefore, respondents could not and did not assert any failure to exhaust internal union remedies as a bar to the action instituted by petitioners.

Because both courts below clearly recognized that respondents had raised no defense of a failure by petitioners to exhaust appellate procedures within the union, they understandably did not treat it as an issue in the case. The District Court noted petitioners' claim that the Labor-Management Reporting and Disclosure Act excused their failure to exhaust further appeals within the union before resorting to court and acknowledged that such Act "allows Court action without exhaustion of administrative remedies if the latter

would require more than 4 months for their completion" (Appendix A, p. 7a). Since it was clear upon brief and in oral argument to the Court of Appeals that respondents had never contested the point, that court obviously had no occasion to discuss it. Petitioners may not invoke the jurisdiction of the federal court by anticipating and seeking to avoid defenses which respondents might have, but did not, present. *Skelley Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 672).

2. The Challenged Agreement Is Not Invalid Under the Railway Labor Act Because Made by the Parent Union Instead of Division 14

Both courts below determined that petitioners' claim that the challenged agreement violated various provisions of the Railway Labor Act and thus presented subject-matter within the jurisdiction of the district court actually resolved itself into the single issue of whether the parent union (acting through its President) or Division 14 was the lawful representative entitled to make such an agreement. Both courts agreed that such an issue was not cognizable in the federal courts absent some other ground for jurisdiction which was not alleged by the complaint aside from reliance upon a claimed violation of the Labor-Management Reporting and Disclosure Act heretofore shown to be wholly inapplicable.

The Court of Appeals regarded the claim as essentially a dispute between a carrier's employees as to who are their authorized and designated representatives and thus subject to the exclusive jurisdiction of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act.

On the other hand, the District Court examined the issue not only on the basis of the allegations of the complaint but in the light of affidavits filed by respondents and on the basis of testimony of witnesses and exhibits introduced at a hearing before it on February 7, 1961, on the admitted single issue of disputed fact between the parties,—namely, the question of whether The Order of Railroad Telegraphers or Division No. 14 of the parent union was the legally constituted collective bargaining representative of the telegrapher employees of the N&W Railroad. As a result of this evidence, the District Court was able to more accurately appraise the extent of the claim of representative authority by Division 14. For example, the District Court had before it statements in the affidavit of respondent Wyatt, Vice President of the N&W Railroad, which established that the parent union "has represented the telegraphers employed by Railway Company for more than thirty-five years and continuously during this period has been recognized by the Railroad as the only bargaining representative of such employees"; that "Division No. 14, as contrasted with The Order of Railroad Telegraphers, is not and never has been recognized as the accredited or proper bargaining representative of the craft of telegraphers employed by Railway Company"; that "Division No. 14, to my knowledge, has bargained with Railway Company only as agent for and pursuant to authority granted by The Order of Railroad Telegraphers"; and that under the terms of the Railway Labor Act "Railway Company must 'treat with' the recognized bargaining representative only and therefore could bargain with Division No. 14 only in its capacity as agent for such repre-

sentative, The Order of Railroad Telegraphers" (Dfts. App. pp. 49-50).[6]

In view of such evidence the District Court discerned that the actual controversy raised by the complaint was, in reality, a dispute between members of two divisions of the parent union over how their seniority should be modified as a result of a rearrangement of employee personnel brought about by the merger of two railroads, and a challenge by one of those divisions of the authority of the President of the parent union to resolve that dispute as directed by a Convention Resolution. Consequently, the District Court described the issue for what it was revealed to be by factual testimony—"one of the internal economy of the union" and as such not a question arising under the Railway Labor Act or other federal law (Appendix A, p. 3a).

In resolving this specific question on the merits, the District Court considered point by point each of the provisions of the Constitution of the parent union upon which petitioners relied and found them to be lacking in merit (Appendix A, pp. 7a-9a). We do not believe it necessary to repeat these specific findings and conclusions here. Suffice it to say they are amply supported by reference to the unanimous decision of the union's Board of Directors to which petitioners appealed the action of respondent Leighty (Dfts. App. pp. 59-71), to the action of the union's Convention itself under its Resolution specifically directing its President to take the action he did (Dfts. App. pp. 40-

[6] We invite the Court to compare these unequivocal statements of fact and of record with the oblique discussion of the issue at pp. 15-16 of the Petition.

41), and to the pertinent provisions of the union's Constitution (Dfts. App. pp. 72-75).

With specific reference to petitioners reliance upon the Railway Labor Act, the District Court also answered the arguments made by petitioners and repeated to this Court (Appendix A, pp. 2a, 8a-9a). Since these contentions underlie petitioners fourth contention of an asserted conflict in the decision below with those of other federal circuit courts of appeals, we shall reserve discussion to that portion of this argument.

3. The Asserted Conflict in the Jurisdictional Holdings of the District Court and Court of Appeals

Petitioners argue that the writ should be granted because the District Court held they should proceed before the National Railroad Adjustment Board and the Court of Appeals held they should proceed before the National Mediation Board (Pet. pp. 14-15). The asserted conflict actually does not exist because both holdings are correct depending upon the extent to which jurisdiction is examined. Petitioners are actually dealing with the second of the three grounds on which the District Court concluded it lacked jurisdiction—a ground which was not reached or discussed by the Court of Appeals. As already demonstrated, the District Court heard testimony and received evidence which permitted it to come to grips with the precise issue actually presented which it held to be the very narrow one of whether respondent Leighty's action in authorizing the agreement with the N&W Railroad violated the internal laws of the union. Such an issue it held not to constitute a federal question and therefore not within its jurisdiction to determine. As also already shown, on this holding the Court of Appeals

agreed with the exception that the ground for the latter's conclusion that jurisdiction was lacking was its view that the intra-union dispute was one for the National Mediation Board rather than for a state court as concluded by the District Court.

However, the District Court then went on to state a further ground why it lacked jurisdiction. It pointed out that the injury alleged by petitioners—infringement of their seniority rights contrary to an agreement with respondent railroad—was the subject-matter within the exclusive jurisdiction of the National Railroad Adjustment Board. This conclusion of the District Court should be considered not only in view of the fact that the complaint alleged no bad faith or hostile discrimination in the making of the challenged agreement,[7] but also in the light of the District Court's further jurisdictional finding that petitioners had made no showing of irreparable injury warranting the issuance of an injunction[8] and that if and when their seniority should later become denied or diminished, they had an adequate remedy to either sue at law or to proceed before the Railroad Adjustment Board (Appendix A, pp. 3a-4a). So considered it is completely consistent with well established law, including among other decisions the following by federal circuit courts of appeals. *Spires* v. *Southern Ry. Co. and B of LE*, 204 F. 2d 450 (4th Cir.); *Colbert* v. *BRT & Pac. Elec.*, 206 F. 2d 9 (9th Cir.) *cert. den.*, 346 U.S. 931; *Brother-*

[7] This is also confirmed by the decision of Court of Appeals (Appendix A of the petition, fn. 3).

[8] In further support of this conclusion of the District Court, see the unrefuted statements in the affidavit of respondent Wyatt that none of plaintiffs or the members they purport to represent on Division 14 have been adversely affected in their employment as a result of the alleged invalid agreement (Dfts. App. pp. 48-49).

hood of Loc. F. & Eng. v. Central of Georgia Ry. Co., and BRT, 199 F. 2d 384 (5th Cir.); *Switchmen's Union v. Ogden Union Ry. & Depot Co. and BRT*, 200 F. 2d 419 (10th Cir.).

As already noted, the Court of Appeals did not reach or discuss this further jurisdictional defect of an adequate remedy at law before the National Railroad Adjustment Board if and when the speculative injury alleged actually constituted an infringement of seniority rights. But certainly this is not the equivalent, as asserted by petitioners, of a holding that the District Court was wrong in its conclusions with respect to the Adjustment Board.

4. The Jurisdictional Holding of the Court of Appeals Is Not in Conflict With This Court's Decision in Brotherhood of Railroad Trainmen v. Howard or With Decisions of Other Circuit Courts of Appeals on the Same Issue Here Involved

Petitioners finally argue that this Court and other circuit courts of appeals recognize that the federal district courts have jurisdiction to adjudicate disputes involving the validity of an agreement under the Railway Labor Act as distinguished from its interpretation. With this general proposition we are not in disagreement. But we do contest petitioners' application of the principle to the factual issue presented by this case and we submit that the decisions relied upon by them are inapplicable. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 is illustrative. In that case this Court considered an agreement entered into by the Trainmen and a railroad the purpose of which was to oust colored train porters from their jobs. It held that such an agreement constituted a breach of the union's statutory duty under the Railway Labor Act which prohibits use of bargaining power for purposes of

racial discrimination. Consequently, it upheld the assertion of jurisdiction in the federal courts to prevent such a violation of the Railway Labor Act. In so doing, it pointed out that no adequate administrative remedy could be afforded by the National Mediation Board or Railroad Adjustment Board.

The factual issue here is entirely different. Here no obligation under the Railway Labor Act, express or implied, is violated by respondents even assuming the validity of petitioners' claim that Division No. 14 rather than the parent union had the right to represent the telegraphers on the N&W Railroad in negotiations concerning their seniority rights. Such a claim either raises the factual question of whether the parent union or its subordinate division is the designated and authorized representative, or it raises the narrower question of whether the parent union has deprived the division of some right to which it is entitled under the union's internal laws. In either event the dispute does not depend upon any provision of the Railway Labor Act which may be resolved by the federal courts. If the question is viewed in the broader aspect of a true representation dispute, it is clearly a problem for resolution by the National Mediation Board, as held by the Court of Appeals, because of the express provisions of Section 2, Ninth of the Railway Labor Act. On the other hand, if the question is viewed in the more limited aspect of an alleged invasion by the parent union of rights secured by the union's Constitution, just as clearly it is a problem for resolution in the state courts absent some recognized ground not alleged in the complaint for jurisdiction in the federal court.

Significantly, petitioners fail to come to grips with either of these basic reasons why their claim does not present a question arising under the Railway Labor

Act or other statutes regulating commerce. Instead they argue abstract propositions not actually involved in the issue which their complaint presents—such as, the alleged lack of notice under Section 6 of the Railway Labor Act. Obviously, such an issue is not involved and cannot arise until the basic issue of whether Division 14 or the parent union is the authorized representative has been resolved.

Consequently, the decisions relied upon by petitioners as creating a conflict (Petition, p. 17) are inapposite. Each of them concerned issues different from the precise issue here involved, and none of them purport to be authority for the issue as resolved in this case either by the Court of Appeals or by the District Court.

5. The Judgment Below Is Manifestly Correct

In the final analysis, it is difficult to indulge the notion that any unresolved or important questions of federal law lurk in the petition once the merits of the case as decided by the District Court are examined. Its Findings of Fact after hearing and evidence establish beyond question that the parent union and not Division 14 is the recognized and authorized bargaining representative of the telegraphers on respondent railroad and that accordingly there is no bona fide dispute on this point which must be resolved by the National Mediation Board. Accordingly, it proceeded to deal with the real issue of whether respondent Leighty had properly proceeded in accordance with the internal laws of the union in taking the action he did. The District Court concluded that he clearly had (Appendix A, pp. 7a-9a). It also squarely upheld the seniority provisions of the challenged agreement as a perfectly lawful modification of pre-existing provisions in the

prior agreement which were in effect before the merger of the Virginian Railway with the Norfolk & Western. (Appendix A, p. 8a) Such a conclusion is amply supported by decisions of this Court and others. It is now well established in the federal courts that a collective bargaining representative and an employer may revise or change agreements between them relating to seniority and that, in the absence of fraud or bad faith—not here alleged by petitioners as expressly observed by the Court of Appeals[9]—such revisions will not be invalidated. In particular, the courts will not inquire into the motives or substitute their judgment on the reasonableness of the modifications.

Ford Motor Co. v. *Huffman*, 345 U.S. 330;
Pellicer v. *Brotherhood of Railway & Steamship Clerks*, 217 F. 2d 205 (5th Cir.) cert. den. 349 U.S. 912;
Colbert v. *Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (9th Cir.) cert. den. 346 U.S. 931;
Lewellyn v. *Fleming*, 154 F. 2d 211 (10 Cir.);
Elder v. *New York Central Ry. Co.*, 152 F. 2d 361 (2d Cir.);
System Federation No. 59 et al v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509 (5th Cir.).

Of all the decisions of the several circuit courts of appeals which we have examined the one which appears to us to be most directly in point with the questions here involved, and supports the disposition made by the District Court on the merits, is *Childers* v. *Brotherhood of R. Trainmen*, 192 F. 2d 956 (8th Cir.). There the court, as here, was confronted with a dispute between two local unions of the Trainmen and a claim by one of them that a decision by the parent union

[9] Appendix A of Petition, fn. 3.

adversely affecting the seniority and work assignments of its members was invalid. Plaintiff contended that the local lodge was the authorized and designated representative of the employees involved rather than the parent organization; that the President of the parent union was without authority under the constitution of the Brotherhood to modify the collective bargaining agreement with the carrier over the protest of the General Committee of the local lodge; and that the President could not waive the right of the members of the local to the 30-day notice required by Section 6 of the Railway Labor Act. In affirming the trial court's denial of a preliminary injunction—the only issue involved on the appeal[10]—the Eighth Circuit upheld the District Court's rejection of the contention that the local lodge, rather than the national organization, was the authorized representative of the employees. In so doing the court recognized, precisely as did the district court here, that plaintiff's contention of representative authority did not in reality dispute the fact that the parent union was the designated bargaining representative of the employees under the Railway Labor Act but only that under the constitution of the parent union the bargaining power was lodged in the local union. Accordingly—again like the district court here—the court examined and found to be without merit plaintiff's reliance upon provisions of the

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[10] Unlike the situation in the present case, the Court of Appeals did not deal with jurisdictional issues. It pointed out that although a motion to dismiss had been filed in the trial court on the ground, among others, that the court was without jurisdiction over the subject-matter of action for the reason that the issues were not justiciable in the federal courts but, if at all, only before tribunals created by the provisions of the Railway Labor Act, such motion had not been ruled upon by the trial court (192 F. 2d 956 at 958).

union's constitution (192 F. 2d 956, 959). The court further upheld the lower court's rejection of plaintiff's reliance upon Section 6 of the Railway Labor Act (Id. at 960). Finally, like the district court in the present case, the Court of Appeals for the Eighth Circuit concluded that since the decision of the President of the Trainmen had been made in good faith and the proceedings were in accordance with the union's constitution, such decision was controlling and the trial court did not err in applying it (Ibid).

Accordingly, the decision of the District Court on the merits is clearly correct and, completely aside from the jurisdictional holdings of either the District Court or Court of Appeals, fully supports the judgment of dismissal entered below (Appendix B).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 3, 1962.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 3433

DIVISION No. 14, THE ORDER OF RAILROAD TELEGRAPHERS, BY R. D. WILSON, ET AL., for use and benefit of all persons similarly situated, *Plaintiffs*,

v.

G. E. LEIGHTY, PRESIDENT, THE ORDER OF RAILROAD TELEGRAPHERS; H. C. WYATT, VICE PRESIDENT AND GENERAL MANAGER OF NORFOLK AND WESTERN RAILWAY COMPANY; AND NORFOLK AND WESTERN RAILWAY COMPANY, *Defendants.*

Before

United States District Judge
HON. ALBERT V. BRYAN

February 7, 1961

APPEARANCES:

L. S. PARSONS, JR., ESQ., *For the plaintiffs.*

JOSEPH L. KELLY, JR., ESQ., A. PAUL FUNKHOUSER, ESQ., EDWARD J. HICKEY, JR., ESQ., and MOSES EHRENWORTH, ESQ., *For the defendants.*

Findings of Fact and Conclusions of Law

THE COURT: Gentlemen, I think I have a fair knowledge of the case, both from your arguments and from a preliminary study of the pleadings.

The real knot of this controversy, as I see it, is the validity of the August 31, 1960 agreement. By that agreement terms of integrating seniority were arrived at between the railroad and The Order of Railroad Telegraphers with respect to the telegraphers in Division 13 and Division 14 as those divisions existed prior to the merger of the Norfolk and Western Railway Company and The Virginian Railway Company. Division 13 apparently embraces within the meaning of The Order of Railroad Telegraphers those employees that were within or on the properties of The Virginian Railway Company, while Division 14 is a corresponding embracing of the union men on the properties of the Norfolk and Western Railway Company. The agreement of August 31, 1960, to repeat, was to bring together, the telegraphers of those two divisions in a roster, or order of seniority among them, when they all became employees of the Norfolk and Western Railway Company.

The first point before the Court is the matter of its jurisdiction of the subject matter. That point is raised by the defendants' motion to dismiss. There would be no jurisdiction in here, by that I mean in this Court, unless the premise of the case was a Federal question, that is, a question arising under the laws or Constitution of the United States, or unless there was diversity of citizenship between the plaintiffs and the defendants. No claim is made for jurisdiction upon the latter ground. The jurisdiction pleaded is the assertion that a Federal question lies at the bottom of this controversy. Frankly, I do not see that there is a Federal question bottoming this dispute. It cannot be said to be founded on the Railway Labor Act. The Railway Labor Act is not in dispute here at all. No provision of it is at issue. Its interpretation is not required. No right, privilege, or obligation arising under that Act is litigated in this suit.

As I said a moment ago, the whole controversy revolves around the validity of the agreement of August 31, 1960.

and, as I will mention in a minute, that validity is not questioned on any ground save that there was a lack of authority, arising in the internal management of the union, to make such an agreement. The whole controversy is one of the internal economy of the union. So I do not see any basis for such a suit as this. Of course, the State court would be an appropriate forum if there were a legally justiciable issue or question presented.

But, if we go further and say that there is here offered for decision a question that stems from some Act of Congress, then we find that Congress has provided a most appropriate tribunal to decide questions just as such are here tendered to the Court. That tribunal is the National Railroad Adjustment Board. It is composed of representatives of unions and of the railroad. It is divided into divisions dedicated to different parts or different segments of railroading and of labor-management questions.

Presumably, the members of that Board coming from, as they do, the unions on the one side, and the railroads on the other, have a knowledge of labor-management, railroad matters that cannot be expected or, if expected, the expectancy is unreliably placed, to be found in a court. Experts are required to solve these questions, and this Board gets its experts from union members and from railroad employees.

So, for these reasons, I do not think that the jurisdiction of the subject matter of this case is in this Court.

But, if we go further than that and say that there is jurisdiction here; that is the power to decide, let us see what basis there is for the remedy sought and what power the Court is asked to exercise in making its decision. It is the issuance of an injunction and an appeal to the equity powers of the Court. It is hornbook law that a court cannot exercise its jurisdiction on the equity side if there is adequate remedy at law.

Here there is an adequate remedy at law. If the seniority to which these plaintiffs are entitled is denied them or is diminished or their claim is impaired in any way, they have a perfect remedy to sue at law for what is due or to proceed before the National Railroad Adjustment Board. That Board may make an award, requiring payment to employees of moneys that would have been received by them had proper principles of seniority been applied. When that award is made it may be brought into Court and enforced by a judgment of the Court.

But all that aside, and let us assume that equity should entertain such a suit, it cannot grant a restraining order or preliminary injunction where the equities are equally valid. It must be shown to the Court that the injury to the plaintiffs would be so irreparable or irremediable unless an injunction were granted that it would be unjust to withhold an injunction. But, if it appears that the equities are equal—that it will hurt one side to grant an injunction just as much as it will hurt the other side not to grant the injunction—the Court cannot proceed in a preliminary fashion and award an injunction.

However, if we go even further, it seems to me that the plaintiffs' case on the merits must fail. As I recall the facts and as best as I can summarize them they are these:

In 1959 these two railroads tentatively agreed upon a merger whereby the Norfolk and Western Railway Company would become the surviving railroad and would absorb the Virginian Railway Company. Under the Interstate Commerce Act that could not be accomplished without preparation or arrangement to see that the rights of the employees of the railroad should not be infringed but should be protected. That requirement is written very specifically into the Interstate Commerce Act. Accordingly, before the merger agreement between the railroads was consummated, there was an agreement, I think dated June 18, 1959, consummated between the Norfolk and Western Railway Com-

pany, on the one hand, and the Railway Labor Executives' Association, on the other, purporting to preserve and protect in the event of the completion of the merger the rights of the employees, so that they would not be harmed and would not be caused loss through this merger.

Now, the Railway Labor Executives' Association is composed of the representatives of the collective bargaining agents of the crafts working on the railroads. Evidently, it is an organization of permanency and of national recognition. In any event, it was acceptable to the Interstate Commerce Commission and given a locus standi to appear on behalf of all the employees which its affiliated organizations represented. That agreement was approved by the ICC. The agreement, of course, envisioned agreements between the railroads and the several crafts, so that the protective purposes of the agreement could be carried into effect in respect to such crafts on the railroad.

Obviously, The Order of Railroad Telegraphers and Division 14 understood what supplementary or implementing agreements were necessary. I say obviously because Division 14 of The Order of Railroad Telegraphers entered into an interim agreement sometime in December, 1959 with the railway. That agreement, of course, did not provide any definitive terms. It simply stated, as I read it, that by or before April 1, 1960 Division 14 would elect either to integrate or it would rely upon, or its members would rely upon, the compensatory benefits and protection that are provided in what seems to have been called the Washington Job Protection Agreement.

That agreement of December, 1959 was signed on behalf of Division 14 by the General Committee or the General Chairman of Division 14. The terms were not reached by April 1, 1960, and extension agreements were entered into. True, those extension agreements were not entered into by the General Committee or by the General Chairman, but

by Mr. Leighty, President of The Order of Railroad Telegraphers.

The sequence of events is that after April 1, I think, the extension was carried into July, 1960, and meanwhile the Grand Division Convention was called into session in June, and the Grand Division Convention met in June, 1960. I may be in error in these designations. They have been so numerous that I can hardly keep up with them. In any event, the Grand Division and the Grand Division Convention is the very summit in power of the telegraphers order. It is supreme under the Constitution. What it does cannot be questioned. It is a case of the King can do no wrong. That Convention, aside from adopting a new constitution, had before it the breach or the divergence that was existing in reference to the integration of Division 14 with Division 13.

That question seems to have been quite a sore or sensitive point, and it had been under consideration since December, 1959 and apparently there was not then in prospect any settlement of it. The upshot was that the Grand Division Convention then authorized Mr. Leighty by its Resolution to make a settlement of the controversy. The evidence uncontradicted here shows that he did from time to time use his efforts diligently and conscientiously to bring the two parties together but without success.

Finally, he made the agreement that is the pith of this case, dated August 31, 1960, which seems to be a sort of a combination of dovetailing and homesteading in bringing together, by way of integration into the seniority list, of the employees on Division 13 and Division 14.

His action in that respect was challenged by an appeal to to Board of Directors. Such appeal was permitted and stipulated in the Grand Division Convention's Resolution. The directors unanimously affirmed the action of the President. To this affirmance a further appeal has been noted

by plaintiffs to the Grand Division Convention which meets in 1964.

Now, this suit seeks to enjoin the performance of the agreement of August 31, 1960. It excuses the failure to exhaust further administrative appeal rights by reference to the Landrum-Griffin Act or the Labor-Management Reporting and Disclosure Act. That Act allows Court action without exhaustion of administrative remedies if the latter would require more than four months for their completion.

Now, let us take out one at a time the attacks made by the plaintiffs upon the agreement of August 31, 1960. This discussion, of course, presupposes that there is jurisdiction both of subject matter and of equity cognizance and that the case is in all respects properly before the Court.

The first ground of assault is that the Railway Labor Executives' Association, the RLEA, could not make the agreement of June 18, 1959 because it was utterly without authorization. Now, there can hardly be a factual issue or even a legal question over that. The Interstate Commerce Commission has really adjudged that authority as being within the powers of RLEA. It accepted the RLEA as the alter ego of the several unions. Now, certainly, we are justified in saying that that is a matter that is adjudicated.

The next attack is upon the authority of the President to sign the agreement of August 31, 1960. It is said, first, that the General Chairman or the General Committee of the Division is the proper person or authority to execute such an agreement on behalf of the Division. That proposition cannot stand. The reason is that undoubtedly the Division is somewhat autonomous, and in matters within its own borders its Chairman and its General Committee are perhaps the supreme officers, but here was a matter that went beyond the Division, that went into the realm of a whole order of railroad telegraphers, so that we look to the Constitution to see who acts in that instance.

Now, the President is by the Constitution given tremendous power, and his responsibility is correspondingly great, but he did not assume to act by himself. He acted only pursuant to the directions of the Grand Division Convention. Admittedly, those positions are above every office, every division, and every segment of the Order. Certainly, we are not in a position to question the authority of the Convention to authorize the President to act. He did act, and his actions on review by the Board of Directors of the Order have been approved.

Now, the agreement of June 18, 1959 contemplates that these implementing agreements shall be made between the railroad and the organizations, and the organizations are the unions, not the divisions of a union.

Further, the General Chairman and General Committee cannot make an agreement even within the borders of its own division save with the approval of the President. So it could hardly be said that the General Chairman and Committee are supreme even within their own division.

Now, additionally, the agreement is attacked on the ground that it is at variance with the 1958 agreement between the telegraphers and the railway. The short answer to that is that if it is in contravention then the former has been modified by this second agreement. The 1958 agreement is not so sacrosanct that it cannot be amended. The merger provision of the Interstate Commerce Act contemplates it may be amended. The Railway Labor Act contemplates amendments. The June 18, 1959 agreement by which these plaintiffs are really claiming benefits envisions an amendment or amendments of the 1958 agreement.

The section of the Railway Labor Act which appears in the Code, I think as 156 of Title 45, does not preclude the agreement of August 31, 1960 as having been reached without adequate notice. The explanation of counsel in reply to the question of the Court, I think, was satisfactory on

that, that is, that the notice therein prescribed had to do with notices as between railroads and the collective bargaining agent.

Now, those are the points that I had noted here as we went along as seeming to me to be the determinative features and factors of this case.

But, finally, and it seems to me overriding here, is that the decision of the issue before us is a decision within the organization itself. It is a decision that is made according to the bylaws, the orders and the Constitution of The Order of Railroad Telegraphers. An association of that sort has the perfect legal right to adopt its own rules and regulations, its own discipline and its own prescription for procedure. No Court has the right to interfere with those provisions. They are binding on every member who goes into the union because he goes in with his eyes open. He knows these are the rules. They are generally perfectly fair, they are perfectly just and they are perfectly reasonable. There is no reason why they should not be invoked. But you cannot be a member of the union and yet not be bound by its rules, and the courts cannot come in and say, well, this rule is not good or that rule is not good. The only time a court can interfere is to say that despite the rule the petitioner or the complaining party has been deprived of a vested right, that no rule can take from him without due process.

Gentlemen, this statement has been far more protracted than I had hoped it would be, but it was necessary to cover in one statement the application for the injunction, the motion to dismiss and the motion for summary judgment.

I think that the motion for summary judgment should be sustained, the effect of which would be, of course, to deny the injunction and dismiss the suit. In those circumstances, of course, the restraining order falls, too.

Ordinarily, findings of fact and conclusions of law would have to be filed if the Court simply went to the point of denying the prelminary injunction. I doubt if that is procedurally so when the motion for summary judgment is also granted.

However, I will adopt this statement as my findings of fact and conclusions of law, and, if you gentlemen will have them written up, I will sign and file them as findings and conclusions.

ALBERT V. BRYAN
United States District Judge

February 16, 1961.

APPENDIX B

Judgment

Filed and Entered January 3, 1962.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8357.

DIVISION NO. 14, THE ORDER OF RAILROAD TELEGRAPHERS, BY R. D. WILSON, ET ALS, for use and benefit of all persons similarly situated, *Appellants*,

v.

G. E. LEIGHTY, PRESIDENT, THE ORDER OF RAILROAD TELEGRAPHERS, H. C. WYATT, VICE-PRESIDENT AND GENERAL MANAGER OF NORFOLK AND WESTERN RAILWAY COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY, *Appellees.*

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 3, 1962.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

February 3, 1962, mandate issued and transmitted to Clerk of the United States District Court at Norfolk, Va.

February 3, 1962, record on appeal and original exhibits returned to clerk of the United States Court at Norfolk, Va.